

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GUILLERMO E. COONEY,
Petitioner.

No. 2 CA-CR 2018-0277-PR
Filed December 11, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20103945001
The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Guillermo E. Cooney, Buckeye
In Propria Persona

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Brearcliffe concurred.

ESPINOSA, Judge:

¶1 Guillermo Cooney seeks review of the trial court's order summarily dismissing his successive and untimely request for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Cooney has not shown such abuse here.

¶2 After a jury trial, Cooney was convicted of four counts of aggravated driving under the influence of an intoxicant and sentenced to concurrent, enhanced, ten-year prison terms for each offense. We affirmed his convictions and sentences on appeal. *State v. Cooney*, 233 Ariz. 335 (App. 2013). Cooney sought and was denied post-conviction relief, and this court denied relief on review. *State v. Cooney*, No. 2 CA-CR 2015-0364-PR (Ariz. App. Apr. 6, 2016) (mem. decision).

¶3 In December 2017, Cooney filed a pro se notice of and petition for post-conviction relief. The trial court dismissed the proceeding, and Cooney did not seek review of that decision. He filed another pro se notice and petition in March 2018 raising numerous sentencing claims and contending that *Alleyne v. United States*, 570 U.S. 99 (2013), constitutes a significant change in the law permitting him to raise those claims. He further asserted he was entitled to raise the claims pursuant to Rule 32.1(e) because he had only recently learned of *Alleyne*. When the state failed to file a response as ordered, the court notified the parties it would take the matter under advisement.

¶4 Cooney then filed a "notice" asserting the state was instead required to "explain their reasons for violating the rules of criminal procedure" by failing to file a response and asking the trial court to hold an informal conference to determine if the court had "violated [his] due process rights on purpose to cover up the state[s] error." The court denied that request and summarily dismissed Cooney's petition for post-conviction relief. It concluded that Cooney's sentencing claims were precluded pursuant to Rule 32.2 because he could have raised them on

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appeal or in his first post-conviction proceeding. Cooney filed a second “notice” citing Rule 32.6(a) and (c), repeating his complaint that the state had not responded to his petition and requesting a status hearing. The court denied Cooney’s request. This petition for review followed.

¶5 On review, Cooney reiterates that the state failed to respond to his petition and that the trial court did not “correct[] the state’s error[]s.” He further asserts, as we understand his argument, that the court erred by finding his claims could not be raised in a successive and untimely proceeding because he had not raised them previously.

¶6 Cooney is correct that the state did not respond to his most-recent request for Rule 32 relief. But he cites no authority, and we find none, suggesting the state’s failure to respond entitles him to relief. Pursuant to Rule 32.6(d), a trial court may summarily dismiss a proceeding after it reviews the defendant’s claims to determine whether any are precluded or untimely and then, of any remaining claims, whether they “present[] a material issue of fact.” The court properly followed that procedure here.

¶7 And we agree with the trial court that Cooney was not entitled to raise these claims in this untimely proceeding. Pursuant to Rule 32.4(a)(2)(A), Cooney was only permitted to raise claims under Rule 32.1(d) through (h). To raise a claim under Rule 32.1(d) through (h), Cooney was required to comply with Rule 32.2(b) by providing “the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner.”

¶8 A claim of an unconstitutional or illegal sentence falls under Rule 32.1(a) or (c) and thus cannot be raised in an untimely proceeding. Ariz. R. Crim. P. 32.4(a)(2)(A). Thus, Cooney’s sentencing arguments are untimely, regardless of whether he had previously raised them. Insofar as he argued below that *Alleyne* constitutes a significant change in the law raisable under Rule 32.1(g), *Alleyne* was decided during the pendency of his appeal and well before his first post-conviction proceeding. Thus, even if *Alleyne* applied to Cooney’s sentences,¹ he has not complied with Rule

¹The only basis for sentence enhancement Cooney identifies was his previous convictions; thus, *Alleyne* does not apply. See *Alleyne*, 570 U.S. at 126 (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000))).

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32.2(b) by explaining why these claims were not raised previously. And, to the extent Cooney asserted in his petition for post-conviction relief that he may raise his sentencing claims under Rule 32.1(e) because he only recently discovered them, that provision does not contemplate newly discovered legal theories, but is instead restricted to “newly discovered material facts . . . [that] probably would . . . change[] the verdict or sentence.” *See State v. Serna*, 167 Ariz. 373, 374 (1991) (describing five elements of cognizable newly discovered evidence claim).

¶9 Although we grant review, relief is denied.